

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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UNITED STATES OF AMERICA

v.

CHRISTOPHER CANTWELL

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20-cr-06-01-PB
June 26, 2020
10:02 a.m.

TRANSCRIPT OF BAIL HEARING
BEFORE THE HONORABLE PAUL J. BARBADORO

APPEARANCES:

For the Government:

John S. Davis, AUSA
Anna Z. Krasinski, AUSA
U.S. Attorney's Office

For the Defendant:

Eric Wolpin, Esq.
Jeffrey Levin, Esq.
Federal Defenders Office

Court Reporter:

Susan M. Bateman, RPR, CRR
Official Court Reporter
United States District Court
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(603) 225-1453

1 P R O C E E D I N G S

2 THE COURT: I want to let the parties know if they
3 aren't already aware, a reporter has been granted access to
4 this hearing. I granted that request.

5 The reporter must keep her microphone and camera
6 muted, may not speak during the proceeding or record during
7 the proceeding, but I wanted the parties to know there has
8 been a member of the public that has sought access to the
9 hearing.

10 Mr. Cantwell, can you see me and hear me okay?

11 THE DEFENDANT: I can, Judge.

12 THE COURT: Let's first address the fact that we're
13 holding this hearing by video conference.

14 As you all know, we're operating in the midst of a
15 pandemic. We aren't currently holding court hearings in
16 person at the moment and haven't for a while, but ordinarily
17 if you wanted a hearing like this in person in the courthouse,
18 I would give you that opportunity. And if that's what you
19 want, I will give you that opportunity. I might have to wait
20 a while before I can do it, but I will definitely give you
21 that opportunity.

22 The fact that we have this pandemic is restricting
23 our ability to conduct in-person hearings. Congress has
24 recognized that and it's authorized courts to conduct hearings
25 by video conference in certain circumstances.

1 The Judicial Conference of the United States has
2 recognized that it's appropriate to conduct these hearings by
3 video under certain circumstances. Our Chief Judge has made a
4 finding that authorizes us to conduct hearings of this sort by
5 video conference.

6 I need to make sure that there are two other
7 findings that are made before I conduct a hearing like this.
8 One is a finding that it would seriously harm the interests of
9 justice to delay the proceeding until I can do an in-person
10 hearing. That's relatively easy because you want out on bail
11 and if I just kept you in indefinitely until the virus was
12 over, it would defeat the very purpose of your motion. So I
13 don't want to delay the proceeding unless I absolutely have
14 to.

15 The other finding is to make sure that you consent
16 to have this hearing conducted by video because if you don't
17 consent, I wouldn't hold it by video. I would have to figure
18 out some other way to try to address the issue.

19 So do you understand that you have a right to an
20 in-person court hearing on this matter?

21 THE DEFENDANT: I do. Attorney Wolpin explained
22 that to me.

23 THE COURT: And are you intending to give up that
24 right and do you consent to have this hearing conducted by
25 video conference?

1 THE DEFENDANT: I do consent, yes.

2 THE COURT: Based on your statements I find that
3 you've knowingly, voluntarily, and intelligently consented to
4 have this hearing conducted by video conference, so I will
5 proceed on that basis.

6 All right. Thank you, Mr. Cantwell.

7 Now let me talk to the lawyers for a second about
8 how I would like to go forward.

9 It seems -- and the government looks at this in a
10 similar way. When I try to divide up the arguments that the
11 defendant is making, they fall into certain categories the way
12 I see it.

13 One category is, hey, I've got a viable defense to
14 this charge and the Magistrate Judge didn't properly evaluate
15 that issue. So that's one category.

16 Another category is the Magistrate Judge really
17 missed the boat on this, on violations of my conditions of
18 release earlier, and you really need to understand the true
19 story on that and when you do, you'll think about it
20 differently.

21 A third issue is things are really hellish at
22 Strafford County and unduly risky to me, and therefore you
23 should let me out on bail.

24 And a fourth category is you should let me out on
25 bail because I need to prepare my defense and this is

1 interfering with my ability to prepare my defense.

2 Obviously these are generalizations, but do you
3 think it's -- I'll ask, I don't know whether Mr. Levin or Mr.
4 Wolpin will present, but do you think these are categories
5 that allow me to kind of analyze your arguments?

6 MR. WOLPIN: I do, your Honor.

7 I think the viable defense, sort of the first
8 category the Court cited, is also a reflection on
9 dangerousness. I think some of the details that have come up
10 as to what's gone on or what the background story of this case
11 in context is is suggestive that there is not a danger to the
12 other party in this case.

13 THE COURT: All right. Why don't we take those in
14 that way, one at a time. Let me hear the defense position on
15 that and then let me hear the government response on it.

16 Please bear in mind that I have the full record of
17 the proceedings before the Magistrate Judge. I have already
18 read your materials. I understand we're going to proceed
19 without additional evidence, except maybe the exhibits that
20 have been identified, and you're going to proceed by proffer,
21 which I'm willing to do. I have high confidence in the
22 integrity of the lawyers for both sides. I know you won't
23 proffer a fact to me unless you have a good faith basis to
24 believe it's true.

25 So I'm fine with that, but I would ask you not to

1 simply regurgitate what's already there because I've read it,
2 or I will read it, and I will fully understand it, I guarantee
3 you, before I act. So if we can keep the focus on new
4 information or highlighting the key points that you need to
5 make and let me follow up with questions, both of you, that
6 would be helpful.

7 Mr. Wolpin, let me start with you and let me start
8 with the first argument.

9 Again, this is an oversimplification, but the way
10 I'm kind of seeing it is there isn't a ton of dispute about
11 the actual conduct that the government says comprises the
12 crime. The real issue -- the primary, there may be others,
13 but the primary issue is this in your view was not a true
14 threat and the government won't be able to prove that it was a
15 true threat at trial, and that when I understand the context
16 of the statement I will come to the conclusion that the
17 government's case is much weaker than it appears to be based
18 solely on the undisputed statements about what -- undisputed
19 evidence about what occurred. It's how you interpret what
20 occurred that gives you your defense, and you say if I
21 interpret it the way you're suggesting, I will see that the
22 defense is stronger and that the inference of dangerousness
23 from the statement is a less strong inference and justifies
24 his -- makes it possible to me to structure conditions that
25 will release him on bail.

1 So that's the way I'm understanding it. If I've
2 got it wrong, let me know. Otherwise, just explain the
3 context to me as to why this true threat defense is really
4 more viable than perhaps the Magistrate Judge thought.

5 MR. WOLPIN: Yes, your Honor. And I will do that
6 through the prism of the dangerousness concern as well.

7 I mean, if you look at how this is charged under
8 875, it is very clear from case law about true threat and jury
9 instructions in this area that context is admissible, that
10 context is vitally important to understanding both parties'
11 sense of what this conversation was about, its meaning. That
12 includes prior context, prior experiences with the person, and
13 how you would understand that other person to be seeing your
14 statements.

15 I focused on this in part as a defense, but more
16 importantly I think when we look at dangerousness the first
17 question should be, not the global question of dangerousness
18 but in a case with an alleged victim, is the alleged victim in
19 danger should there be release. And I think based on the
20 totality of what I'm going to discuss the evidence is that is
21 simply not the case in this situation.

22 This is a case that was really about trolling and
23 winning. These are two Internet personas. One that goes by a
24 pseudonym and Chris who goes by his real name, that say really
25 inflammatory things on the Internet. That's the context of

1 how they know each other.

2 And when the FBI went to see, for example, the
3 other party, Mr. Cheddar Mane, their description of their
4 conversation include the following, and I think it's important
5 to understand the language.

6 THE COURT: Before you do, let me just -- I hope
7 you're not saying this. I hope you're not saying Mr. Cantwell
8 is so inflammatory in the way he generally addresses subjects
9 that he can't make a true threat because everything he says is
10 so outrageous that nobody can take it seriously.

11 MR. WOLPIN: Absolutely not. That's why I'm
12 starting with the other party, because obviously a statement
13 to my grandmother is different than a statement to this
14 individual. So I think it's fact-specific, which is why I'm
15 trying to tailor my arguments to the facts of this person
16 because I agree if this were a targeted thing or something to
17 the public generally, I think that's a different matter, but
18 this is a very specific, concrete, discrete conversation
19 between two people, and so I'm not making that argument.

20 THE COURT: Okay.

21 MR. WOLPIN: So I will focus on this other
22 individual and why those conversations are different than
23 conversations that might occur between Chris and another
24 party.

25 But just to understand that that's sort of the

1 context, you know, the FBI goes and speaks with him and he
2 says the following: Whether he was making comparisons of
3 hard-working ranch niggers in Montana to other African
4 Americans across the country or saying kill the cops, rape the
5 cops, kill this, he described it all as bullshit.

6 Members of their group were always trying to get as
7 close to the edge of legality as possible without going over.

8 That's the mentality of the other party involved.
9 It's a purposeful lion poacher. This person describes
10 themselves as a troll. Explains that when they saw that they
11 were getting to Christopher and they were causing a reaction
12 from him, then that was like gasoline on the fire to cause
13 them to push further, to go further and go again and again and
14 again, to troll him, to attempt to cause him to get upset and
15 angry.

16 That is a fundamentally different person than
17 someone who is a member of the public who is not choosing to
18 engage in that behavior and does not come from that mindset
19 that we will push all the limits of the law and say things
20 about rape and killing that is far different than what I think
21 the general public would do.

22 The evidence that Chris is a danger to Cheddar Mane
23 is lacking every step of the way. It's lacking before this
24 conversation in June. This is a situation of someone I would
25 describe as a bully. They selected a person, Chris, that they

1 thought they could bully. They talk about how they did that.

2 You don't bully someone who you have a true fear is
3 going to cause you harm. You know that that person really is
4 going to be riled up, but you do it with a knowledge and an
5 understanding that when you bully on the schoolyard, you're
6 bullying someone who is not going to punch you back. So they
7 walk in and he walked in eyes open.

8 If you then look in the moment of this conversation
9 in June and you look at his responses, it's not indicating
10 someone who believes he's in danger. He's sparring. You are
11 desperate and pathetic. You're a faggot ass kike. He's
12 responding with all these things that are not indicative of
13 someone who's afraid in the moment but someone who is
14 purposely and sort of enjoying engaging in this kind of back
15 and forth. That's not evidence of someone who believed he's
16 in danger.

17 What happens immediately after this interaction in
18 June shows that this individual did not believe he was in
19 danger because he posted the conversation online. That's the
20 game. That's the goal. That's how you win at trolling. If
21 you troll somebody and it's private, it means nothing.

22 THE COURT: Do you agree that the evidence suggests
23 that -- again, I only have what's -- I'm not prejudging at
24 trial because I have no idea what the evidence at trial would
25 be, but the evidence that we're taking as a given here

1 suggests that Mr. Cantwell wasn't just engaging in a back and
2 forth trolling. He was trying to get this person to give him
3 something that he wanted, which was identifying information on
4 a third party.

5 And so these were not just a back and forth, two
6 trolls trolling each other. It was Mr. Cantwell trying to get
7 a troll to give him something that the troll didn't want to
8 give, and so the rhetoric has to be understood in that
9 context, doesn't it?

10 MR. WOLPIN: It does, but that context also
11 requires a showing of a true threat. So the threat to injure
12 must accompany the request for some kind of --

13 THE COURT: Ordinary coercion that doesn't rise to
14 the level of true threat is not going to support the -- or be
15 sufficient to justify a conviction.

16 My point is that this isn't just -- and I think you
17 don't disagree with this. This isn't just back and forth
18 trolling. This is you say a troll who is trying to provoke
19 Mr. Cantwell and Mr. Cantwell not simply responding in kind.
20 Mr. Cantwell has a goal. His goal is I want to force this
21 person to do something he doesn't want to do and how far do I
22 need to go to force him to do what I want him to do, and he's
23 willing to use very extreme rhetoric whether it's a true
24 threat or not as an effort to try to force.

25 I guess my question to you is, if you are using

1 rhetoric to try to force somebody but everybody knows that the
2 rhetoric is empty, how does that force somebody to capitulate?
3 In other words, unless the threat is calculated to be
4 believed, it doesn't seem to have any ability to coerce
5 because the goal here is coercion. The question is whether
6 the coercive goal was sufficiently extreme to qualify as a
7 true threat. But how is something coercive if it's just two
8 people who use extreme rhetoric firing at each other?

9 MR. WOLPIN: I don't think it is particularly
10 coercive, and I think that's why this individual doesn't
11 respond by giving information. I think that's -- I mean, just
12 for background, the information that's sought is from the
13 person who's sort of the ringleader of the trolls. This isn't
14 an individual -- again, a general individual. This is someone
15 who has chosen to sort of engage in this conduct and is sort
16 of the higher-up in this group of individuals.

17 But I don't think it has much power. I think it's
18 a lot of bluster and not a lot of coercion, because again we
19 see it doesn't effectively work and I don't think it would
20 have worked. I don't think there was any fear on Mr. Cheddar
21 Mane's part that someone was going to come and have sex with
22 his wife in the same way that, as I put in my most recent
23 filing, he makes a reference to sort of injury could happen --
24 things could happen to this woman who's connected to Chris.

25 I mean, this is just a different situation than two

1 normal individuals. But rather than again focus on the
2 defense, the question is, is this person in danger, and
3 they're not. They're thousands of miles away -- or a thousand
4 plus, I don't want to identify where, but a significant
5 distance away.

6 When the FBI goes and talks to him months later
7 they ask, you know, has he e-mailed you, has he contacted you,
8 has he showed up at your door? No, no, no, no, no.

9 There's nothing that goes on after the summer
10 between these individuals. The pictures of the family are not
11 to my knowledge ever posted online. This ends essentially in
12 June or a little bit thereafter between these two individuals
13 with no further contact.

14 THE COURT: Have I misunderstood? I thought the
15 government was contending that in fact at least one of the
16 defendant's threats was actually carried out, not any of the
17 violent --

18 MR. WOLPIN: The call to CPS occurred, yes, but
19 again, that's not a threat to injure or a threat of violence
20 as has been alleged in the current charge. The charge
21 relates, as they keep referring to, as an allegation of a rape
22 threat. That's what they've charged, not CPS.

23 THE COURT: But I think the government's position
24 is -- and I would just be interested in your response. I'm
25 not adopting it. The government's position is that in the mix

1 of determining whether something can qualify as a true threat
2 or not when a person makes threats A, B and C and carries out
3 threat C, it tells us something meaningful about whether
4 threat A is also a true threat or is not.

5 MR. WOLPIN: I mean, I think they can make that
6 argument. I don't think it holds water in this particular
7 case because I don't think that's the kind of thing that this
8 individual or Mr. Cantwell would think would occur, which is
9 raping his wife. So that's the charge. That's sort of a
10 different question, and I think this is of a different
11 character than that.

12 But again, I know -- this is sort of walking this
13 edge between the actual defense at trial versus the question
14 of dangerousness.

15 And, you know, I think there are these questions
16 that will arise at trial. I think this is a trial with very
17 sort of triable facts under what the law is, but also
18 ultimately the thing is this person has no more Internet
19 presence he's asserted. He has not had any contact with
20 Chris. Chris has sat in jail with discovery. Although the
21 government makes a reference to protective orders, he's abided
22 by that protective order. He's not revealed this person's,
23 you know, information which he could easily do through
24 contacts outside the jail.

25 This dispute has ended. It will resolve presumably

1 in the courtroom. But this is not something where this person
2 needs Christopher incarcerated to protect himself from
3 Christopher. That's simply not the case. The evidence
4 doesn't support that.

5 THE COURT: Can I ask you, what do you say to the
6 government's contention -- again, I'm not adopting it. I'm
7 testing what the government says and giving you a chance to
8 respond.

9 I think the government is making a contention that
10 your client while incarcerated has made statements that as
11 soon as the case is over he's going to release all of the
12 documents so that people who are cooperating with the FBI will
13 be held accountable, and that sort of, according to the
14 government, undercuts your theory that, oh, this dispute is
15 over, let bygones be bygones, we're all fine. According to
16 the government, they rely on this exchange he had in some kind
17 of an interview to support the view that it's not in fact
18 over. That your client is planning to disclose the
19 information as soon as in his view he's free from the order.

20 The government says the order goes beyond that. We
21 don't need to debate that for the time being. It's just the
22 inference that I think the government -- the strongest
23 inference the government can draw from that argument is that
24 your client doesn't intend to let this lie. He intends to
25 just put out on the Internet whatever information he can about

1 the people who he thinks have wronged him. The government
2 says that kind of undercuts your argument that he's in a let
3 bygones be bygones mode.

4 MR. WOLPIN: And I'll respond to that in two ways.

5 First, I took that as evidence of the opposite.
6 The fact that -- his understanding of the order is right now I
7 cannot reveal this information. I am very concerned with
8 abiding by court orders. I am not going to reveal this
9 information because I understand I'm not allowed to.

10 His understanding was that after the case was over
11 that would no longer be the case. It wouldn't be a violation.

12 THE COURT: Let me stop you. I'm inclined to agree
13 with you on that issue. I just want to be clear. I think the
14 government makes too much of it when he suggests that's
15 evidence of an intention to violate orders because they
16 haven't demonstrated that the order is so unambiguous that
17 your client necessarily would have known that it would violate
18 the order. I'm inclined to agree with you on that.

19 I'm raising a different point, which I think the
20 government is also making, which is whether he's violating the
21 order or not when the case is over, he's made clear his
22 intention, which is to try to do as much as he can to damage
23 in the public eye people who he thinks have wronged him by
24 disclosing information about them which is not the true threat
25 that would put him in jail but is evidence of continued

1 antagonism towards the people who he believes have wronged him
2 and so undercuts your argument that it's let bygones be
3 bygones, this is all in his past, he just wants to get on with
4 his life. The government says that's not the case.

5 MR. WOLPIN: Well, I mean, I don't -- obviously
6 there's going to be animosity in a situation like this. The
7 question is, what actions is the person going to take.

8 And the evidence again here is he's going to abide
9 by the order. That he hasn't made efforts to contact him.
10 That months have gone by without -- you know, we're talking
11 about the summer of last year. So we're talking almost a
12 12-month, 11-month window.

13 So I think he's entitled to be frustrated. He's
14 held in jail on this thing that happened months ago that this
15 guy never reported. You know, he went to talk to the FBI. He
16 sought their help. He went to Keene PD and sought their help
17 as to what these guys were doing. And rather than them
18 investigate or take that seriously, it gets flipped around on
19 him. They go out and search out this other individual who is
20 not reporting any fear or threat, and suddenly he's thrown in
21 jail.

22 So I think it's a little unfair to think that he
23 wouldn't have some frustration sitting in a cell all day every
24 day based on this, but the question is not whether --

25 THE COURT: I don't doubt that for a minute. I

1 mean, to the extent you're saying it's not anything to worry
2 about going forward, we say it's not anything to worry about
3 not because he doesn't really -- isn't really angry with these
4 people. It's that it isn't anything to worry about because he
5 will pursue his anger in ways that are legitimate and not
6 illegitimate.

7 MR. WOLPIN: I think it's fair to say there's a
8 frustration. I don't know that I would say there's an anger.

9 To the extent that this is the case -- again, the
10 question the Court needs to fashion is whether he can abide by
11 the order. Is it a situation where it's complete bygones be
12 bygones? You know, he feels targeted. The fact that he wants
13 the whole story to come out after this case is over or through
14 this case I think is fair. It doesn't necessarily mean it's
15 an anger at him. I think some of the frustration is with the
16 FBI and with the effort that's been made to prosecute him.

17 THE COURT: I think there's your point. Your point
18 is that he's not -- his statements shouldn't be construed to
19 mean he's going to try to expose confidential information
20 about somebody or information about their identities. He just
21 wants the story to be told.

22 So if he were consistent with that, he would say,
23 of course I'm not going to release the identity of people who
24 I know my followers will harass, but I'll release the evidence
25 about the true story so that everybody knows what happened,

1 which is an entirely legitimate decision on your client's
2 part. It's whether I can construe that statement to be as
3 nuanced as you're suggesting.

4 MR. WOLPIN: I mean, again, I think the biggest
5 concern on my client's end is it does feel like a targeting
6 situation, a selective type prosecution, for reasons I can go
7 into in greater deal. I think that's the concern is having
8 the public know why this has happened to him and less to do
9 with exposing. He could have done that all along. You know,
10 these pictures could have gone online. He could be --

11 THE COURT: That would be clearly in violation of
12 an order while he's facing trial which I assume you would give
13 him the strongest of possible advice that that is not in his
14 personal interest to do something like that because it would
15 redound to his detriment. I don't doubt you would do that
16 because you're such a good lawyer. So we can get beyond that.
17 I mean, let's just move on. I think we got the point.

18 MR. WOLPIN: Okay.

19 So again focusing on this individual and whether
20 there's a danger to this individual, the answer is simply no.
21 The facts do not support it. The government waited a number
22 of months to get an indictment. There was no escalation over
23 the November, December, January as we waited. It was
24 essentially set at that point. I don't think there was going
25 to be, you know, any dustup, any blowup, until this came back

1 on the radar because the FBI brought this charge -- or the DOJ
2 brought this charge.

3 So, you know, again I think the focus needs to be
4 on whether there's a danger to this individual.

5 I can discuss in greater detail sort of the broader
6 danger. I know the Court may be looking to have this be a
7 sort of back and forth so I don't know if the Court wants the
8 government to respond for a portion.

9 THE COURT: I would like the government to respond
10 on this aspect of it.

11 Of course, you know, you can -- the evidence of
12 guilt of the charge affects the bail analysis in more than one
13 way in a case like this and you certainly can argue the second
14 part of it.

15 I'm just looking at right now trying to assess is
16 the evidence of the case -- the guilt of the defendant as
17 strong as the government suggests it is or is it much weaker
18 as you're arguing, and once I make that determination I'm
19 certainly open to hearing arguments about what that tells us,
20 if anything, about the defendant's dangerousness, and I'll
21 give you a chance to respond on that.

22 I just have one more question for you before we
23 turn to the government.

24 I do not routinely address bail issues. Bail
25 issues like this have come up only a handful of times in my 28

1 years -- almost 28 years on the court. They're usually
2 addressed by the Magistrate Judge so I'm less familiar with
3 that. I read up on the standard. I think I understand it.

4 One standard I am very familiar with, because it's
5 part of my real life every day, is when evidence is sufficient
6 to allow a case to go to the jury. You know what that
7 standard is because you deal with it extensively.

8 It would seem if the evidence were to come in as
9 proffered by the parties, and appears to be undisputed here,
10 that this would be a case where the judge would easily have to
11 deny the motion for judgment as a matter of law because it
12 would be really up to the jury to assess this.

13 What I understand you to be saying, and I'll be
14 questioning the government about this, is that true threat in
15 these kinds of cases is almost always a quintessential jury
16 question and whether the government can prove beyond a
17 reasonable doubt.

18 Now, you'll preserve your right to argue that it's
19 insufficient, but I think we both know that that kind of
20 language in the context in which you're describing would be
21 sufficient to permit a jury to find guilt. Whether a jury
22 is -- how likely the jury is to find guilt is a different
23 matter about which we could debate, but based on my
24 familiarity of the judgment as a matter of law standard and
25 the evidence that the parties have presented to me by proffer

1 that appears to be undisputed, without judging any inference
2 about whether there is or is not a true threat, there's
3 sufficient evidence of a true threat to permit the case to go
4 to the jury it would seem. Do you have a different view on
5 that?

6 And again, you've reserve your right to argue
7 anything at the trial.

8 MR. WOLPIN: I mean, I guess what I would say is
9 that to some degree I'm still in the process of going through
10 all of the true threat cases and the jury instructions.

11 You are dealing with a situation where there is a
12 -- we're bumping up against constitutional rights, and so I do
13 think it's something that the Court would need to scrutinize
14 to ensure that there truly is an overcoming of the true threat
15 standard. Whether ultimately that gets anywhere or not from
16 the legal standard the Court would be using is another
17 question, but I do think the Court -- this is not a situation
18 where it would be necessarily just an obvious call because I
19 do think some of the law on true threat makes clear that you
20 just -- you really do need to have some scrutiny as to whether
21 there is evidence of the mental state portion and that this
22 goes beyond the free speech rights of an individual.

23 THE COURT: Right. I don't know as much about the
24 bail standard as I do about the First Amendment which I feel I
25 have a fairly deep understanding of for having worked with it

1 for many, many years, and I've read the true threat cases and
2 understand that.

3 I guess what I'm saying, and I will say to the
4 government, is he clearly has a true threat defense here that
5 has to be explored and that is something that I need to
6 consider in the mix.

7 It appears though on the surface of it given my
8 basic understanding of First Amendment law, and again without
9 prejudging a situation, but this is unusual because the
10 historic facts about what actually occurred don't appear to be
11 in dispute. And so where there don't appear to be substantial
12 disputes with those facts, and I would apply the very
13 government-friendly standard that would apply in a judgment as
14 a matter of law, that is, could any reasonable jury conclude
15 beyond a reasonable doubt that this was not a true threat --
16 excuse me -- that there's a reasonable doubt about whether
17 this is a true threat -- again, I'm misstating the standard.
18 I apologize. It is -- at the end of the day the evidence
19 sufficient to permit a reasonable jury to conclude that this
20 was not a true threat and -- that this was a true threat and
21 does justify the conviction, I apologize for the many efforts
22 at restating that, but I think I got to it at the end, that is
23 a question that -- you don't know what a jury will do with it
24 until they hear the fullness of the evidence.

25 My view, as the judge in a trial like that, is not

1 to make a judgment as to whether it is a true threat or is it
2 not a true threat. It's whether a reasonable jury could
3 conclude that it's a true threat.

4 MR. WOLPIN: The interesting thing about a lot of
5 the First Amendment cases is they do come from sort of
6 writings that are undisputed. They're letters to public
7 officials or postings online, and courts are intervening to
8 say this does or doesn't qualify.

9 So again, without going through the full litany of
10 cases, but it isn't a situation where just because sort of
11 facts as to the content of the statement are not in dispute,
12 the courts haven't intervened using --

13 THE COURT: I completely agree with that. The
14 problem for you is on the paper surface the language is
15 extremely threatening. So that's the -- that's what I mean.

16 In a case in which the facts are undisputed and the
17 language used is extremely threatening and directed at a
18 specific individual, if you don't do certain things I'm going
19 to do these horrible things to an individual, and all of that
20 is undisputed, that's the kind of case that ordinarily goes to
21 a jury. It still is open to a jury to conclude that I have a
22 reasonable doubt about whether that's a true threat.

23 MR. WOLPIN: I mean, I don't want to get bogged
24 down on the entirety of the chain of conversation, but I know
25 sometimes what happens is the government says rape threat,

1 rape threat, rape threat, and then that essentially becomes
2 the factual foundation of what we're working -- that is not
3 the language in the actual conversation.

4 THE COURT: I've looked at the language in the
5 actual conversation and I've listened to the excerpt that one
6 of you has produced. I will study it very carefully. I
7 understand all of that.

8 All right. Mr. Davis, you seem to think this is an
9 open and shut case of a true threat.

10 I'm sorry. Mr. Davis, are you with us?

11 MS. KRASINSKI: Your Honor, if you don't mind --

12 THE COURT: All right. Whoever is going to speak.
13 I assumed it was Mr. Davis, I apologize, because he's in the
14 center of my screen, and you're way off in the corner so I
15 didn't notice you. I know that you've signed the filings.
16 I'm happy to have you speak rather than Mr. Davis. He just
17 happened to be in the center of my screen when I was looking
18 for who from the government was going to talk.

19 MS. KRASINSKI: That's fine, your Honor.

20 THE COURT: So you seem to think this is an open
21 and shut case, but don't you acknowledge that there is a
22 defense here about whether this is or is not a true threat?

23 If it's not a true threat, it's not going to be
24 constitutionally permissible to incarcerate Mr. Cantwell on
25 the basis of his use of language.

1 MS. KRASINSKI: I certainly acknowledge that there
2 is a defense that it's not a true threat. I think the jury is
3 going to have to evaluate all of the context. That's going to
4 include what Attorney Wolpin discussed but also anticipated
5 testimony from the victim that he was scared. That he was
6 acting like a tough guy but really he was scared. He went out
7 and he got game cameras to protect his property to try and
8 protect his family.

9 THE COURT: What do you say to the argument that he
10 wasn't really fearful because of his actions, not reporting it
11 to the police, not seeking protection, continuing to provoke
12 the defendant, as the way the defense sees it? What do you
13 say to those arguments?

14 MS. KRASINSKI: What I think is that the jury is
15 going to have to evaluate all of the context. That there is
16 evidence that the jury could use to find that it was a true
17 threat, and there's evidence that can be argued to the jury
18 that he really wasn't scared.

19 But I think one of the important factors is the
20 victim's reaction is one of many factors in determining
21 whether or not something is a true threat, and it's certainly
22 an important factor but it's not the only factor.

23 And I think the jury --

24 THE COURT: What about the history of the trolling
25 relationship between these people where the alleged victim is

1 engaging in provocative conduct that appears to be in part
2 trying to provoke? That doesn't sound like somebody who
3 believes they're subject to a true threat.

4 MS. KRASINSKI: Well, I guess I would have two
5 responses to that.

6 The first is that there's no provocation defense to
7 this charge.

8 The second is that that context is slightly
9 different. They were prank calling his show as a group, and
10 not all of that can be attributable to this one individual.
11 Members of the group, the defendant alleges, hacked his
12 website, but the defendant acknowledges in e-mails that he
13 sent to local law enforcement that that can't be attributable
14 to the victim here.

15 There's certainly a history between these
16 individuals, but I don't think the fact that there's this
17 history means that it can't have been a true threat.

18 And I also think --

19 THE COURT: Well, yeah, I think -- again, I don't
20 think that it means that it can't have been a true threat, but
21 I don't think the history is irrelevant either. I think Mr.
22 Wolpin makes an important point that in all communications
23 context matters and we have to consider the totality of the
24 interactions between these individuals in determining whether
25 something that appears on the surface to be extremely

1 threatening, and it does appear to me on the surface to be
2 extremely threatening and it does appear to be based on a
3 desire to try to coerce compliance. And so saying things that
4 you know the other side won't take seriously, it's hard for me
5 to see how that -- why you would use that kind of rhetoric if
6 you're trying to coerce compliance. It's more likely you use
7 that kind of rhetoric when you want the person to understand
8 that your threats have force behind them, I get that, but we
9 have to consider the entire context of the interaction.

10 MS. KRASINSKI: I think this entire context is
11 important, too, your Honor. It includes, even within this
12 correspondence, the defendant's threat to "dox" or expose
13 personal identifying information of the victim and his quest
14 to obtain the information to dox the leader of this group.

15 And that actually ties in to Government's Exhibit 1
16 which is an article called Undoxing Anonymity, which -- it's
17 from the defendant's website, and on page 2 of that article
18 Mr. Cantwell describes doxing and he says, "It helps to think
19 of doxing as a form of violence. It certainly carries the
20 potential for violence to result. It is typically seen as a
21 last resort."

22 So in the same communication where he says if you
23 don't want me to come and F your wife in front of your
24 children, he also threatens to do something that he, himself,
25 has described as violent, as something that carries the

1 potential for violence.

2 THE COURT: That evidence -- you're not making an
3 argument that that is the true threat that justifies a
4 prosecution. You're saying that's evidence that you can
5 consider in context in trying to determine whether the
6 threatened charge is because that wouldn't be a
7 constitutionally permissible threat in my mind to support a
8 prosecution.

9 MS. KRASINSKI: That's correct, your Honor.

10 THE COURT: Okay.

11 MS. KRASINSKI: And I just want to make one point
12 about the pictures of the victim and his family.

13 They were posted by the defendant on the
14 defendant's Telegram account to all of his followers, to all
15 the members of that group.

16 So in addition to calling the victim's local Child
17 Protective Services, he also made public these photos, photos
18 of the victim's wife and their children.

19 THE COURT: I haven't seen -- I can't remember if
20 I've seen this yet. Are those photos in the record?

21 MS. KRASINSKI: They are not, your Honor.

22 THE COURT: All right. So you're telling me that
23 the photos clearly show the victim and his family?

24 MS. KRASINSKI: They do, your Honor.

25 THE COURT: All right. What else on this issue of

1 the evidence supporting the charges? Is there anything else
2 you want to add on that score?

3 MS. KRASINSKI: I would like to address the
4 protective order issue.

5 And I do think Attorney Davis would like to address
6 some of the new arguments made in the reply that Attorney
7 Wolpin also made here regarding --

8 THE COURT: All right. Well, I did bring up the
9 protective order in response to an argument Mr. Wolpin was
10 making, so why don't you address that and then I'll hear from
11 Davis, and then I'll give Mr. Wolpin a chance to reply.

12 MS. KRASINSKI: So my main concern with the plans
13 to disclose discovery materials is that the effect of this
14 statement, how it was made and who it was made to, is
15 essentially a thinly veiled threat to anyone who has
16 cooperated with the FBI that you are going to be exposed and
17 so you should consider your long-term risk here. Are you
18 going to continue to cooperate with the FBI? Are you going to
19 continue to provide information?

20 He made it to someone who he allows to publish a
21 podcast on the defendant's website to someone who is currently
22 operating his website and --

23 THE COURT: Let me interrupt you. It would be
24 better for the defendant if he were to have said something
25 like this: Of course I'm not going to reveal any information

1 about any individual who may have provided information to the
2 FBI, but I just want to get my story out, and when I'm
3 acquitted of this, as I will be, I want the public to know the
4 full story of how the government targeted me.

5 That's an entirely legitimate thing to do. On the
6 other hand, it's quite problematic for someone charged with
7 threatening people who are not giving him what he wants to be
8 also saying -- or as you're suggesting what he's doing is, I'm
9 doing this to threaten people who might cooperate with the
10 FBI.

11 MS. KRASINSKI: Well, and I --

12 THE COURT: He isn't clear about what he's meaning
13 here. Isn't that at least a fair defendant protective way to
14 look at his statement?

15 MS. KRASINSKI: Well, I don't think he limits his
16 disclosure to individuals involved with this case. What he
17 says is --

18 THE COURT: Yeah, he does not expressly limit --
19 he's going to disclose the records about the case is what I
20 thought. You don't see it that way?

21 MS. KRASINSKI: He says: All the people who gave
22 up all these other Fing people, everybody who has the Fing FBI
23 show up at their door goes Fing crazy and starts giving people
24 up.

25 So all the people who gave up all these other Fing

1 people, that is not just related to the defendant or his case,
2 and so I don't --

3 THE COURT: With respect, I think you may be over
4 reading it because the protective order doesn't purport to bar
5 him from disclosing information unrelated to this case that he
6 has.

7 Five years ago he learned person A cooperated with
8 the FBI. Do you construe the protective order as barring him
9 from disclosing that information?

10 MS. KRASINSKI: No. He says -- what he says is:
11 I'm going to release all the 302s of all the Fing interviews.

12 I construe the protective order to bar him from
13 disclosing the 302s that he received in discovery.

14 THE COURT: I think a reasonable way to read that,
15 at least my reading of it, is that he is -- what he's talking
16 about is telling his story and disclosing everything he has
17 about that story, which presumably would include 302s and
18 discovery information that identifies people who are giving
19 information to the government about Cantwell. That's what I
20 understand him to be doing.

21 I think you're reading a little more into it than
22 it can reasonably bear, but that's just my interpretation.

23 What else did you want to say?

24 MS. KRASINSKI: I think Attorney Davis is going to
25 address a few issues that Attorney Wolpin discussed and were

1 raised in the reply brief.

2 THE COURT: All right. Mr. Davis.

3 You've got to turn your mic on, Mr. Davis.

4 MR. DAVIS: Can you hear me now?

5 THE COURT: Gotcha.

6 MR. DAVIS: I'll address the supplement to the
7 defendant's motion that was filed two nights ago.

8 The first thing is just to talk about the issue of
9 the defendant's cooperation. The defendant is saying that the
10 government is misstating the element of deception and lack of
11 complete statements about this in his so-called cooperation,
12 and I want to briefly go through the timeline and state
13 exactly what the government's position is on this.

14 All my references to dates are 2019 except the
15 last. So this is all last year.

16 On February 11th Mr. Cantwell filed an Internet
17 Crime Complaint Center complaint with the FBI about the
18 defacing of his website and he named two people, Vic Mackey
19 and Mosin-Nagant, as perpetrators. Those are both pseudonyms
20 of people in Bowl Patrol.

21 Mr. Cantwell had already made three previous tips
22 to an FBI hotline all regarding Antifa and none resulted in
23 significant further investigation.

24 In this case the IC3 determined that the
25 information had no current lead value and did not provide a

1 basis to investigate.

2 The important point is the IC3 did not notify FBI's
3 Boston Field Office or FBI agents in New Hampshire. FBI
4 agents here remained unaware of Mr. Cantwell's IC3 complaint
5 until July 17th when Mr. Cantwell sent them a copy.

6 So the defendant's claim that the government got
7 this report and then deliberately ignored it is not correct.
8 The only unit that received that did not further disseminate
9 it and took no action.

10 All right. So I'll move through the other dates
11 quickly.

12 On February 26th Mr. Cantwell doxed Mosin-Nagant,
13 one of the two perpetrators he named in his IC3 complaint. He
14 spread his true name and identity all around and Mosin-Nagant
15 was effectively neutralized just two weeks after his Internet
16 complaint.

17 The events in this case occurred -- the extortion
18 and the threats against Cheddar Mane occurred, as the Court
19 knows, on June 15th and June 16th.

20 On June 17th Mr. Cantwell doxed Cheddar Mane by
21 posting Cheddar Mane's home address and photos of him and
22 family on Radical Agenda.

23 And also on June 17th Mr. Cantwell called the Child
24 Abuse and Neglect Hotline in Cheddar Mane's home state and
25 reported Cheddar Mane.

1 On June 21st Mr. Cantwell e-mailed the Keene Police
2 Department regarding Bowl Patrol. Mr. Cantwell described his
3 recent exchange with Cheddar Mane and he enclosed photos of
4 Cheddar Mane's family and home address.

5 What Mr. Cantwell did not do is he did not send
6 screenshots of the Telegram exchange and he said nothing about
7 the rape threat he had made or his extortion attempt regarding
8 Vic Mackey's personal information. Mr. Cantwell also did not
9 claim there that Cheddar Mane threatened Peach.

10 On July 11th of 2019 FBI headquarters discovered
11 Mr. Cantwell's extortion and threats posted on a Bowlcast
12 Telegram channel and then notified the FBI Boston Field
13 Office. So our FBI agents in New Hampshire found out about
14 this exchange not from Mr. Cantwell but from an Internet group
15 that was monitoring the Bowlcast.

16 In mid July of 2019 the FBI contacted Mr. Cantwell
17 and began an e-mail dialogue.

18 On July 17th Mr. Cantwell sent the FBI a screenshot
19 with the account of someone named Karl Childers sending a
20 message to Peach on July 10, and Peach is a female who
21 actually took the pictures of the family of Cheddar Mane, and
22 Karl Childers' e-mail said: Agent Peach, you want to take
23 some pictures of my family and send them to your FBI friends.
24 Mr. Cantwell complained of harassment being extended to "a
25 former love interest of mine." Mr. Cantwell did not claim

1 that Cheddar Mane had threatened Peach in the harassment as he
2 now does.

3 On August 28th Mr. Cantwell e-mailed the FBI in New
4 Hampshire and enclosed photos of Cheddar Mane and his family.
5 That was the first time FBI here actually got that information
6 from Cantwell. Although Cantwell had e-mailed it earlier to
7 the Keene police.

8 Cantwell in his e-mail to the FBI on August 28th
9 admitted that he threatened to expose Cheddar Mane's identity
10 and offered him the out of identifying Vic, but he says -- he
11 also said he was attaching "the images in the prior message,"
12 but again, and this is what's important, he did not send
13 screenshots of the exchange and he again said nothing about
14 the rape threat.

15 On September 17th the FBI and Keene police
16 interviewed Mr. Cantwell in Keene. During that lengthy
17 interview that was mostly directed by Mr. Cantwell of all of
18 the different people he wanted to talk about, he mentioned his
19 exchange with Cheddar Mane while again saying nothing about
20 the rape threat.

21 Mr. Cantwell specifically stated that he had not
22 retained any records of his communications with Cheddar Mane.
23 Mr. Cantwell also denied threatening anyone in Bowl Patrol.
24 And finally, after the corresponding exchange with Cheddar
25 Mane, according to Mr. Cantwell he deleted the chat and called

1 Child and Protective Services the next day. As it turns out,
2 those were false statements.

3 On October 24th the FBI and Keene police again
4 interviewed Mr. Cantwell. He was then shown the screenshots
5 of the Telegram exchange, and he admitted sending the
6 messages. We do not contend that he made a false statement in
7 that exchange with the FBI.

8 And finally, on January 23rd, now 2020, the FBI
9 executed search warrants of Mr. Cantwell's residence and
10 seized devices, including computers and a cell phone.

11 On the computer were photos of Cheddar Mane's
12 family in the same labeled file with complete screenshots of
13 his exchange with Cheddar Mane.

14 In addition, screenshots of the Telegram exchange
15 with Cheddar Mane were on his phone and had been saved and put
16 there on June 17th of 2019.

17 Thus, the defendant had the screenshot records all
18 along, but he withheld them from the law enforcement people he
19 dealt with and he claimed to have deleted them.

20 Two other points and I'm done, your Honor.

21 The first is, the defense in the supplement alleges
22 that Mr. Cantwell's threat against Cheddar Mane's family was
23 provoked by Cheddar Mane's "menacing statement about Peach."

24 The defense says that Peach was Mr. Cantwell's
25 "paramour and his girlfriend and significant other." The

1 defense says that the obvious intent of Cheddar Mane's
2 statement was to suggest that "something bad or injurious
3 would happen to Peach as a result of Cantwell's actions."

4 This new defense claim is beside the point and
5 badly misleading. There is no obvious intent behind Cheddar
6 Mane's statement which is in its entirety, "Guess that means
7 you don't care what happens to her either."

8 The statement is ambiguous and could have multiple
9 interpretations. At most, however, it's an implied threat
10 that Peach might be doxed, meaning have her identity made
11 public, just as Cantwell is threatening to dox Cheddar Mane,
12 but it is not a threat to rape Peach or to cause some other
13 physical harm to her.

14 Cantwell's new claim that Cheddar Mane's remark
15 about Peach, which is never repeated in the Telegram messages
16 and never comes up again, the claim that that's in the same
17 league as his repeated threats to harm Cheddar Mane's family
18 is demonstrably false.

19 The new defense claim also ignores that it was
20 Cantwell who almost two hours before this statement about
21 Peach -- again, just going back to the Telegram, he threatened
22 that your wife is going to have trouble sleeping at night
23 until she leaves you and takes your kids away, and nearly two
24 hours after the Peach remark Cantwell returns to Cheddar
25 Mane's wife and bets that one of my Incel listeners would love

1 to give her another baby.

2 Neither of those remarks, both of which were
3 unambiguously menacing, was in any way provoked by the
4 statement about Peach.

5 Finally, to characterize Peach as Cantwell's
6 girlfriend and significant other is flatly misleading. By
7 June of 2019 Peach was history to Mr. Cantwell. He had been
8 involved with Peach briefly months earlier but was now well
9 entwined with a different woman in another state.

10 That other woman stayed with Cantwell in New
11 Hampshire as early as May 20th and over a six day period in
12 early June, all before these threats. And just eight days
13 after the June 21 e-mail to Keene Police Department Mr.
14 Cantwell drove to the other state where his girlfriend lived
15 and began the first of several lengthy visits with that other
16 woman.

17 So, in summary, although the defense now tries to
18 justify Cantwell's rape threat against Cheddar Mane's family
19 on the ground that it was provoked by a similar threat against
20 Cantwell's girlfriend, it turns out the statement about Peach
21 was not a similar threat, it did not provoke Mr. Cantwell's
22 cruel fixation with Cheddar Mane's spouse, and it did not even
23 involve Cantwell's girlfriend.

24 The last point. Defense also claims with a
25 straight face that Cantwell made a comment about having sex

1 with Cheddar Mane's wife but did not "suggest violence."

2 As the defense would have it, Cantwell was
3 envisioning only consensual relations with Cheddar Mane's wife
4 either by Cheddar Mane or by an Incel listener but never
5 violence.

6 That claim is as desperate and ridiculous as it is
7 offensive. By sending Cheddar Mane photos of his wife and
8 children, then saying that he would F his wife in front of his
9 kids and that one of his Incel listeners would love to give
10 her another baby, Mr. Cantwell did more than suggest violence.
11 He threatened rape, and there's no question about that.

12 That's all, Judge.

13 THE COURT: All right. Again, this is the
14 challenge when you present to the trial judge. You had a
15 chance to litigate bail in front of the Magistrate Judge. You
16 now want to litigate bail de novo in front of the trial judge.

17 One of the factors that I must consider when
18 evaluating your request is the strength of the evidence. So
19 this is why we effectively are in a back and forth proffer
20 battle about what your trial is going to be like. I would
21 prefer not to be engaged in this kind of analysis, but you
22 require it of me so I will.

23 What else would you like to say, Mr. Davis?

24 MR. DAVIS: That's all, Judge.

25 THE COURT: Mr. Wolpin.

1 MR. WOLPIN: I mean, I guess I don't really want to
2 go through all the efforts Chris made to be in touch with the
3 Keene PD and the FBI, his statements to them, his providing
4 them of the pictures involved.

5 As I noted in what I filed, the reason this comment
6 about Peach and the other parts of this do not show up in
7 Chris's mind is because they were not true threats. This was
8 part of the back and forth.

9 The thing he tells the FBI and Keene PD about is
10 the thing about CPS and that phone call and the identity
11 because that's the actual substance to some degree of this
12 matter.

13 I think the Court -- and we are in a strange
14 situation because we have a group of people who use a set of
15 language different from the rest of us. The world that these
16 gentlemen swim in has this concept of cuckoldry. It's the
17 ultimate Albright insult, okay? Rush Limbaugh uses it.
18 Everyone in this movement -- you hear it all the time when you
19 start digging into what these guys say.

20 THE COURT: Just to be clear, you're not saying
21 that someone like Mr. Limbaugh uses the same language that Mr.
22 Cantwell used here? If he has, I would be very surprised, but
23 do you have evidence that he has used that language?

24 MR. WOLPIN: Cuck language, yes. I had cited an
25 article --

1 THE COURT: No, no, no. I mean the language that
2 Mr. Cantwell used here.

3 MR. WOLPIN: No, but I want to put in context for a
4 second what this statement is about as I see it in this
5 culture.

6 THE COURT: Okay.

7 MR. WOLPIN: Because it is a culture. It's not a
8 -- you have to recognize it within the culture within which
9 they operate, which is there's constant conversation about
10 who's a cuck, who's a cuckle. The concept of cuck and
11 cuckoldry is about someone else sleeping with your wife. It's
12 the ultimate demasculating thing. That you are so unable to
13 satisfy sexually your own spouse that she will have sex with
14 somebody else. This is the primary insult these men give to
15 each other in this culture. It is not the same as someone
16 else in another situation in another culture.

17 So when they talk about I'm going to have sex with
18 your wife, it's not I'm going to rape your wife. It's you are
19 such a non-man that someone else is going to move in on your
20 territory and on your wife.

21 THE COURT: I get your proffer on this, but Mr.
22 Davis is going to be as upset about what you're saying as you
23 are about what he's saying, and I cannot settle that dispute
24 today. So I would really ask us not to engage in further
25 debate about whether this is simply a statement I want to have

1 consensual sex with your wife and she wants to have it with me
2 or whether it's a -- I mean, come on. You may be able to
3 present some evidence on that point, but I don't want to hear
4 any more about the back and forth on it because you're both
5 just spinning to support your own position.

6 So let's move on and get into something more
7 substantive. What else do you want to say?

8 MR. WOLPIN: That wasn't my goal. My goal
9 primarily today was to talk about the fact -- not of the
10 incident but the fact of whether or not he's a danger to this
11 person today, because I think that is ultimately -- the
12 factual questions will be resolved by a jury. That's the
13 point.

14 THE COURT: Don't you understand -- I understand it
15 as one of the requirements that I assess the evidence and
16 that's why I'm doing this. I would prefer not to be doing it
17 because I don't like the trial judge to have to come in and
18 make preliminary assessments of evidence before a trial, but
19 you've required me to do it by filing your motion so I have to
20 do it. I know you want to talk only about dangerousness, but
21 is it not a factor that I'm required to consider?

22 MR. WOLPIN: It is, and you have a situation where
23 the government is acknowledging there's -- you know, Attorney
24 Krasinski acknowledged there's a true threat defense,
25 acknowledged there's a dispute to be had at trial.

1 So whether that's a 50 percent, 60 percent, 40
2 percent, that obviously is too far to go into. I think we
3 could almost stop there.

4 This is a triable case with a real defense that's
5 not fanciful that will be heard by a jury in the future.

6 THE COURT: I will grant you that, but what you're
7 deemphasizing and what the government emphasized in its
8 materials, it's one of these unusual criminal cases where the
9 defendant does not appear to be disputing any of the facts
10 about what actually happened. And on the basis of those
11 undisputed facts it appears that a jury will have to decide
12 the defendant's guilt or innocence as is always the case in a
13 criminal trial where there's sufficient evidence to permit a
14 guilty verdict.

15 I take your point. I think you understand my
16 position. Why don't we move on if there's anything else you
17 would like to say. I'm not inclined to get into such a
18 fine-grained assessment of the evidence based on the parties'
19 competing proffers. What matters to me is what happens at
20 trial because I don't see the defendant at the present time at
21 least to be presenting a motion to dismiss based on First
22 Amendment assertions. Maybe you'll present that in the
23 future. If so, I'll look at it and consider it, but right now
24 I don't think a more fine-grained analysis of the evidence
25 based on proffers is really productive or good for your client

1 for me to be engaging in.

2 What I take from it is the historic facts on which
3 the government's prosecution is based appear to be undisputed.
4 There appears to be a very vigorous dispute about what to make
5 of those facts and whether what actually occurred is a true
6 threat or not. That's not a dispute that I could resolve in
7 the government's favor. It has to be resolved if it's in the
8 government's favor at trial after a verdict, and it would only
9 be resolved in your favor on a motion to dismiss, on
10 constitutional grounds, or on a verdict in your client's favor
11 after a trial.

12 The unusual point is the historic facts about what
13 actually occurred don't appear to be disputed. In my mind
14 they appear to be sufficient to support a viable trial.
15 Although I keep an open mind about any First Amendment
16 argument you might present. And I recognize there is a
17 defense about whether this is a true threat in which there
18 almost always is in these cases. In any case in which someone
19 threatens like this, it is almost always open to the defense
20 to say, I didn't mean it. It wouldn't be understood as a true
21 threat. It's not a true threat. It's constitutionally
22 protected conduct. That's always the case in criminal
23 threatening cases.

24 So that's what I make of all of this. Beyond that,
25 I don't think it's productive for you or your client for me to

1 try to get into a more fine-grained analysis.

2 MR. WOLPIN: Certainly that was not my effort or my
3 goal in our conversation today.

4 THE COURT: All right. What else did you want to
5 say about this issue of the evidence supporting the charge?

6 MR. WOLPIN: I don't think there's anything more to
7 be said.

8 THE COURT: All right. Let's turn to the -- this
9 is where I need your most help, and this is understanding --
10 because even reading the materials I'm not sure I have a full
11 understanding of the context about noncompliance, and so if
12 you could lay out in some detail for me your facts that bear
13 on the noncompliance issue, and then I'll hear from the
14 government on it, because I'm not sure I have the same kind of
15 understanding of that issue and where the disputes are. It
16 will be helpful to hear your views.

17 MR. WOLPIN: I think unfortunately the record that
18 came from Virginia is not clear as to the progression of
19 events and so I think that's why there's a lot of confusion,
20 but I can go through what I understand them to be and
21 obviously the government can address how they understand them
22 to be.

23 As I understand it, Mr. Cantwell is arrested. He
24 was released on bond conditions that did not at the time
25 prohibit alcohol but did prohibit arrests. He ultimately

1 drank, over drank, was stopped, and that caused him to return
2 to court and have a change in his bail conditions that
3 prohibited the consumption of alcohol and placed a bracelet
4 upon him with some kind of alcohol recognition.

5 We submitted to the prior hearing a letter from --

6 THE COURT: Can I understand just -- can I
7 understand this?

8 So unlike what we have, which is a device that we
9 use regularly to determine whether somebody is complying with
10 a home detention condition, this was a bracelet that monitored
11 where he went and when he went; is that right?

12 MR. WOLPIN: I'm hesitant to say too certainly
13 because some of the details are a little hazy in my mind. My
14 memory is it's the kind that's like a SCRAM bracelet that has
15 an alcohol ability to monitor and monitors location to my
16 memory.

17 THE COURT: He was not prohibited from leaving his
18 home or going to any particular location. He was simply
19 required to have his location identifiable transparent to the
20 government, and you say also there's an alcohol monitoring
21 capacity with that?

22 MR. WOLPIN: I believe it was a SCRAM bracelet.

23 THE COURT: We don't use those in my experience
24 here. So just tell me what a SCRAM bracelet is.

25 MR. WOLPIN: It requires you to essentially show

1 that you're not using. Again, I would maybe take a break and
2 talk to my client because I don't want to make any
3 misrepresentations to the Court, and some of this is not in
4 written documentation so it's coming from memory.

5 THE COURT: Let's take it for now, though, you're
6 telling me it's basically a GPS monitor and there were no
7 restrictions on where he could go and so he was -- he wasn't
8 in noncompliance because of where he was at any point or that
9 he had left the home or anything like that. He was in
10 noncompliance for reasons that we'll go into.

11 MR. WOLPIN: And my understanding there was a
12 geographic limitation within the state and that he was not
13 supposed to leave the state, and there was no assertion that
14 he left. But once you're on these monitors, obviously that
15 requires check-ins with certain regularity and other sort of
16 details beyond just them physically knowing where you are.

17 The reason we submitted what we submitted is we
18 were able to speak with the individual who did the monitoring
19 in Virginia and explained that once he became involved there
20 were no issues at all. In fact, I think he called him
21 essentially overly compliant, making continual efforts to be
22 in touch with him and be checking in as necessary.

23 So we submitted that because it showed that with
24 the benefit of the monitor there was strong compliance, and I
25 think it's fairly unusual for the monitoring company to be

1 willing to go on the record and say that, but that's what they
2 did in this case.

3 My understanding of the contact issues is that
4 there was never any effort by Chris to make contact with the
5 two other people involved in his case. That's how I
6 understand it.

7 And my understanding is that his original
8 conditions did not --

9 THE COURT: Can I interrupt you and ask, what do
10 you understand the term contact to mean?

11 MR. WOLPIN: My understanding of contact is
12 calling, texting, third party contact, meaning have someone
13 contact for you, that that was never an issue. The issue was
14 that the other individual was sort of a high profile person on
15 the other part of this with a Twitter presence and followers
16 and sort of that argument was continuing to follow online, and
17 so Chris was responding to that and there were limitations in
18 place about referencing that. And my understanding is at one
19 point that person's name did appear on a program, but there
20 was no threatening nature to it.

21 THE COURT: Let me just be clear. So you
22 understand the contact restriction to be broad enough to
23 encompass direct physical contact but also less direct forms
24 of contact like phone calls, e-mails, texting, and so you
25 agree that those can give rise to contact violations?

1 MR. WOLPIN: Correct.

2 THE COURT: And you're acknowledging that there was
3 some kind of exchange here or some kind of statement by your
4 client in a forum where one of the victims was also present at
5 some point?

6 MR. WOLPIN: No. That there was a mentioning of --
7 it got so fine-grained that it led to a mentioning of the
8 identifying characteristics of the person even if not in the
9 same forum.

10 So the violation is mentioning this person's name,
11 as I understand it, on a -- you know, not in a forum she was
12 in.

13 THE COURT: What is the actual language of the
14 contact condition? Do you have it?

15 MR. WOLPIN: I don't know that I do right now.

16 THE COURT: Does the government have the actual
17 language of the contact condition?

18 MS. KRASINSKI: Your Honor, I'm looking at
19 Government's Exhibit 1 to the initial detention order, and
20 it's a bond, recognizance bond dated January 31, 2018, and it
21 says, "No contact direct or indirect with the victims,
22 including but not limited to using names or identifying them
23 by specific characteristics which identify them on social
24 media or radio broadcast."

25 Although there's a date to that afterwards, a

1 handwritten date of April 26, 2018. So I cannot tell when
2 that portion of it was added to it. The top is dated January
3 31, 2018, and there's an additional handwritten date of April
4 26, 2018, on the bottom.

5 THE COURT: So let me try to understand this.

6 What appears on the document is a description of a
7 no contact requirement that goes beyond what we would
8 commonsensically understand to be contact and also includes
9 identification.

10 So even if you're not contacting, if you're
11 identifying you would say that violates the condition?

12 MS. KRASINSKI: Correct, your Honor.

13 THE COURT: All right. And you're telling me I
14 can't tell you with certainty when that condition was imposed?
15 Does it all appear to have been imposed at the same time?

16 MS. KRASINSKI: It doesn't look like it. It
17 appears that the recognizance bond was entered on January 31,
18 2018, and then at the bottom of it it appears that the
19 defendant initialed it and signed it, but again on the very
20 bottom right-hand of the page there's an additional date and
21 there's really nothing on the face of the document to
22 indicate --

23 THE COURT: Do you have the courtroom deputy's
24 e-mail address?

25 MS. KRASINSKI: I do, your Honor.

1 THE COURT: Could you e-mail to defense counsel and
2 to the courtroom deputy a copy of this document, and then if I
3 could ask my deputy to e-mail it to me directly so that I can
4 see what it is.

5 MS. KRASINSKI: Yes, your Honor.

6 THE COURT: It's hard for me without actually
7 physically looking at it to know what's going on here.

8 So if you could do that now, e-mail it to my deputy
9 and defense counsel.

10 Vinny, if you could then promptly e-mail it to me
11 and to my law clerks, that would be helpful.

12 THE CLERK: Okay.

13 THE COURT: All right. So I'll go back over this
14 in some detail once I look at it, but Mr. Wolpin, she's
15 identified -- the prosecutor has identified what she thinks is
16 the condition that would violate it, but there's some question
17 about when that condition was added.

18 Is there anything you want to say about that? I'll
19 look at it in depth when I actually see the document.

20 MR. WOLPIN: My technology is failing me at this
21 moment. It won't let me pull anything up.

22 I think what is clear is there was no direct or
23 third party contact involved at any point in this allegation
24 or this bond violation, and there was never even an accusation
25 that that was done in relation to this case.

1 THE COURT: What was the violation as you
2 understand it?

3 MR. WOLPIN: Using this person's name online.

4 THE COURT: Okay. So that was the violation.

5 MR. WOLPIN: Right.

6 THE COURT: You don't dispute that he did do it,
7 you don't dispute that it was a condition and he violated it,
8 but you have some contextual explanation?

9 MR. WOLPIN: Yes.

10 THE COURT: Okay. Go ahead. What else did you
11 want to say about it if anything?

12 MR. WOLPIN: You know, what -- again, some of this
13 is in there and some of it isn't. That the bond conditions
14 did not allow him to identify -- use identifying
15 characteristics. That he stopped doing so. That he had a
16 recorded phone call on his website, and he did not edit out a
17 name when it came up. And again, I think this condition or
18 this situation is far different because you have someone who
19 was sort of actively engaged on the Internet talking about
20 Christopher, this was an ongoing thing, as opposed to the
21 situation where we have here where in this case there's no
22 Internet presence at all for this individual. There's no back
23 and forth that's sort of continued to go on. The other party
24 in the other situation was sort of an antagonist and sort of
25 in that mode from the opposite side of the political spectrum.

1 Again, this is far different. We've seen months
2 without any contact or efforts to make contact. Again, he's
3 been abiding by the current bail -- or protective order as far
4 as limiting such information.

5 THE COURT: All right. Hang on just a second.

6 (Pause)

7 I would ask the government, can you tell me the
8 date on which you claim the disclosure -- let's call it a
9 disclosure violation rather than a contact violation because
10 it's a little misleading to call it a contact violation.

11 What date do you claim the disclosure violation
12 occurred on?

13 MS. KRASINSKI: Looking at Government's Exhibit 3
14 from the initial detention hearing, which I've also just
15 e-mailed to your courtroom deputy and defense counsel, that is
16 the Commonwealth of Virginia's motion to revoke or modify
17 bond, and that alleges that there was continued online and
18 on-air communications inconsistent with the amended bond
19 conditions that occur after April 26, 2018. The motion itself
20 does not identify the date specifically, but the motion
21 alleges that they occurred after April 26, 2018.

22 THE COURT: All right. Hang on a second. I'll put
23 that up on the screen, if I can remember how to do this, so
24 everybody can see what it is we're talking about.

25 MS. KRASINSKI: And that's on paragraph 15 of

1 Government's Exhibit 3 from the initial detention hearing.

2 THE COURT: I would ask my clerk to make me a host
3 so that I can share my screen and the clerk will let me know
4 when he's done that.

5 THE CLERK: You're now a host, Judge.

6 THE COURT: All right. Are you able to see a
7 portion of a document that I put up on the screen? Are the
8 parties able to see that?

9 MS. KRASINSKI: Yes, your Honor.

10 MR. WOLPIN: (Nods affirmatively.)

11 THE COURT: Yes? Okay.

12 So what I understood the government to be saying is
13 that this handwritten condition which appears to have been --
14 based on the dating was added on 4-26-18, the government is
15 alleging that this disclosure violation that occurred
16 according to the motion of the Commonwealth was after that
17 amended condition was imposed on 4-26.

18 Is that your assertion? Do I have the government's
19 position correctly on that?

20 MS. KRASINSKI: That is what the Commonwealth of
21 Virginia alleges in their motion. Yes, your Honor.

22 THE COURT: All right. Good. Okay. So I'll take
23 that down unless, Mr. Wolpin, do you need to see anything more
24 on this?

25 MR. WOLPIN: No, your Honor.

1 THE COURT: Okay. All right.

2 So back to you, Mr. Wolpin. So basically the
3 violation that I think is being talked about is a disclosure
4 violation in violation of a bond condition.

5 Anything you want to add about that?

6 MS. KRASINSKI: It was not a person that was
7 involved in an outing or a doxing in that sense. This was
8 someone who has a known presence and name. So it wasn't done
9 with that kind of malicious effort to sort of identify someone
10 or cause harm in that way which I think again speaks
11 differently than the facts we have in this case.

12 And again, we've had -- obviously there's going to
13 and would continue to be conversations about the limits of
14 whatever order the Court makes about contact reference that
15 would be in place in relation to the bail order in this case
16 should there be one.

17 THE COURT: All right.

18 What does the government want to tell me about the
19 specific evidence of what actually happened here? What the
20 defense has alleged is that there was a violation of the
21 disclosure condition that occurred in a forum that didn't
22 involve direct or indirect contact with a person that he's not
23 supposed to have contact with, but it did involve the
24 disclosure of information that the condition prohibited and
25 that this was, according to the defense, a circumstance where

1 the defendant was essentially being attacked on this forum and
2 needed to respond and that disclosure came out somewhat
3 innocuously in the context of his response. That's what I
4 understand Mr. Wolpin to be telling me.

5 Do you want to give me anymore information on that?

6 MS. KRASINSKI: I think the best indication of
7 whether or not someone is going to comply with bond conditions
8 is whether or not they've complied with them in the past.

9 THE COURT: Well, I agree that's important. I
10 mean, do you know anything more factually about the specific
11 violation here? If it happened by accident, it's a lot less
12 significant than if it happened intentionally. Do you know
13 the forum where the violation occurred? Do you have copies of
14 the exchanges in which the violation occurred? Do we know
15 more about the circumstances of the violation, anything else
16 like that you can tell me to flesh this out and get more
17 detail?

18 MS. KRASINSKI: I don't, your Honor. I only have
19 the defendant ultimately acknowledging and pleading guilty to
20 it, your Honor, but I don't have --

21 THE COURT: Was there a transcript of the
22 proceeding in which he pled guilty?

23 MS. KRASINSKI: If there is, I don't have it, your
24 Honor.

25 THE COURT: All right. Yeah, it would be helpful

1 if there was one. And if the Commonwealth operated the way
2 our court did, there would be first a statement that, here's
3 what you're charged with doing. Here's the facts supporting
4 that charge. Do you dispute those facts and are you in fact
5 guilty?

6 That would have been nice to know, but you just
7 don't have anything more for me on that?

8 MS. KRASINSKI: I don't, your Honor. I'm going to
9 take a peek quickly at the sentencing order and see if there's
10 anything in there, and if there is, I'll circulate it to --

11 THE COURT: All right. That would be helpful.
12 Thank you. All right. Nothing else to add on this.

13 Anything else from you, Mr. Wolpin?

14 MR. WOLPIN: No, your Honor.

15 THE COURT: Okay. All right.

16 So then let's turn to the third argument, which is
17 Strafford is too risky for someone to be incarcerated in and
18 Mr. Cantwell should be released because it's just too
19 dangerous.

20 MR. WOLPIN: I think this is a dual argument.

21 One is, it's not just the conditions at the jail.
22 It's that the nature of this pandemic is when there will be a
23 jury trial is fairly uncertain. I mean, I know we're moving
24 in that direction in court and obviously we're all hopeful,
25 but this case is a case where we're going to have witnesses

1 coming from out of state. I assume multiple witnesses. This
2 isn't sort of the test case where we have a one-day trial that
3 we can pull off fairly easily.

4 We're in a position where our ability to
5 communicate, our ability to visit him -- I know the Court and
6 I have had conversations in other conferences about some of
7 the limitations on that. We have a case with a lot of data, a
8 lot of information that's somewhat difficult to follow up with
9 with Mr. Cantwell.

10 And so we're in a position where, you know, when
11 trial will occur is really uncertain at this point and, you
12 know, we're in a position as we began this hearing arguing
13 about whether there's a viable defense, which there is.

14 And so the concern with the pandemic is, you know,
15 twofold. One is sitting in jail in the pandemic and the other
16 is sitting in the jail in the pandemic with an indefinite sort
17 of current suspension of jury trials with the hope and
18 expectation that the end of the trial will be a go date but
19 may or may not be.

20 As to the conditions within the jail, obviously we
21 have the fortune of a case going on in this court with
22 extensive pleadings and extensive testimony and a lengthy
23 opinion by the Chief Judge explaining some of the deficiencies
24 that are occurring at the Strafford County House of
25 Correction.

1 THE COURT: Do you contend that I am bound by her
2 factual findings?

3 MR. WOLPIN: I don't contend that you are bound by
4 it, but there's a fully litigated record. It's not a
5 situation by proffer that was disputed. It was a situation
6 where there is testimony, there was argument, there was, you
7 know, essentially a full airing of the facts and conclusions
8 that were made.

9 Obviously if the Court has reason to feel that
10 those were inaccurate, I'm not going to stop the Court from
11 taking up that issue.

12 THE COURT: I'm not necessarily saying that I
13 disagree. I'm saying that one of her principal concerns in
14 that case, as I understand it, that justified her conclusion
15 was concern about whether ICE detainees had been properly
16 evaluated for preexisting conditions and that the risks that
17 are posed to anyone in a prison with preexisting conditions
18 that leaves them at substantially elevated risk is an
19 important consideration when you are required, as you always
20 are, to detain somebody. And there's no -- and that was one
21 of her principal concerns as I understand it, which is not a
22 concern in this case because you're not asserting that your
23 client has some kind of predisposition that renders him at
24 greater risk than others. At least I haven't seen your
25 medical evidence of it. So I don't think that is the concern.

1 You talk about in your materials that people have
2 tested positive, but do you have the details of it? Because
3 the details that I have had is that to the extent that there
4 have been staff people there, a staff person that's tested
5 positive, they were tested positive, then tested again and
6 were negative and never showed any symptoms.

7 I don't know if you've done a -- if you've delved
8 into the details about testing, but even a test like the
9 current PCR testing for COVID that is maybe 99 percent
10 specific when applied to people without symptoms has a
11 potential for a false positive of approaching 50 percent.
12 There have been no documented transmission from that person
13 who tested positive.

14 The two inmates that you identify, at least it's my
15 understanding, are inmates who entered the facility with a
16 positive SARS diagnosis but that those people were held and
17 are being held and were held in quarantine and not into the
18 general population and that no other identified cases have
19 occurred that have been wholly within the population.

20 I'm also not sure what the basis for the Chief
21 Judge's findings which were more than a month ago really
22 capture what's currently going on at the facility.

23 So I'm not in any way suggesting that I dispute her
24 findings, but I think that if you wanted to make a case to me
25 that in fact the Strafford County Jail is a disaster area

1 where people are at such high risk that they can't be confined
2 there, that would be something you would have to do more than
3 simply cite to the Chief Judge's report because it's not
4 consistent with the way I understand the current conditions
5 are operating.

6 I also think it's important to keep in mind that
7 our baseline numbers in New Hampshire suggest that there are
8 currently diagnosed within the state -- only about .1 percent
9 of the general population currently have a diagnosed case of
10 COVID that have not yet recovered.

11 There are certainly asymptomatic individuals. I'm
12 aware of many studies that suggest that as many as 50 to 75
13 percent of the population may be without symptoms, either
14 asymptomatic or presymptomatic. But even if you assume that
15 that is true and that you double or triple the percent testing
16 positive and having active COVID, and say there's an
17 equivalent or double or triple amount within the general
18 population, the evidence suggests to me that the COVID risk in
19 New Hampshire currently to the general population is very low.
20 In fact, almost all of our serious ill cases in the state are
21 in nursing homes which unfortunately have done far less well
22 when compared with the Strafford County House of Correction.

23 So I'm not -- I'm open to hearing evidence from
24 you, but I'm not inclined to make a judgment that Strafford
25 County is so dangerous that no one can be confined there when

1 even the Chief Judge hasn't made that. Her ruling is based on
2 much earlier information. Her concern was with a different
3 population and with respect to a particular concern about
4 people with a different risk assessment than your client
5 apparently has.

6 So I understand why you need to do what you do and
7 I've taken your evidence and I'll certainly read and think
8 about the Chief Judge's opinion, but without other evidence
9 I'm not inclined to attribute -- or base a bail decision for
10 your client primarily on evidence that Chief Judge McCafferty
11 relied on in making a very different determination for a
12 different population at a different time.

13 What else would you like to say about that?

14 MR. WOLPIN: Just two relatively brief responses.

15 The first, if you do look at her order, you know,
16 one of the portions she talks about is those failures as far
17 as social distancing that's occurring within the prison.

18 I know my client is in a bunk situation with
19 another individual in a small cell. They're going still to
20 sort of get, you know, trays for lunch in a communal
21 atmosphere. There are a number of things she notes about in
22 her findings that are beyond just those that have a
23 preexisting condition, including citing the Savino case, I
24 won't read the whole citation but it's noted in my filing, and
25 that those things are ongoing and not sort of at their end.

1 I know it feels like it's good news and sunshine in
2 New England. You know, we're dealing with a lot of clients
3 out of Devens which isn't far where there are numerous cases
4 going on.

5 Whether there's a case today or whether that case
6 comes in tomorrow, I know -- you know, my kids' baseball was
7 just cancelled because someone had a COVID interaction and now
8 that's on shutdown. We're still going through this.

9 And more importantly, you know, we're taking these
10 precautions ourselves. I'm not in front of you or none of us
11 are because we have concerns that being in tight spaces for
12 long periods of time is dangerous even though I am relatively
13 young and don't maybe have a preexisting condition.

14 So, you know, I think that applies -- you know, we
15 can't start our hearings by addressing how significant the
16 pandemic and the risk is that we're sort of no longer pushing
17 in-person hearings and then, you know, think that the risk is
18 so minimal that those who are incarcerated should be subject
19 to those risks.

20 I mean, he's still innocent of this charge. This
21 isn't a compassionate release situation where, you know, we're
22 discussing reducing sentences for those that are guilty.

23 THE COURT: Well, I hope you don't think so little
24 of me that you think I don't care about the people that I'm
25 dealing with. I hope you don't think that I'm so ignorant

1 that I assume that there are no risks associated with these
2 activities. I hope you don't think that I haven't been
3 carefully -- I'm in meetings most of the day, meeting with an
4 expert two days ago about risk assessment. I have been
5 reading hundreds of studies. I have been spending countless
6 hours analyzing risk. I do not think that there is zero risk.
7 I do not think that things are all sunshine in New Hampshire.

8 I think I have a more detailed understanding of
9 this than you. For example, you don't reference the effective
10 reproduction number in New Hampshire. The effective
11 reproduction number in New Hampshire is significantly below 1
12 right now. That tells you something about how rapidly the
13 virus is spread.

14 And I hope you don't think I'm so ignorant to think
15 that people in prisons are not at greater risk than the
16 general population because they necessarily have to be
17 confined together in ways that limit the ability to do social
18 distancing.

19 These things are not all or nothing decisions
20 despite the way people like to argue them. They are carefully
21 considered nuanced decisions and they may vary over time.

22 Fortunately, we are moving in an environment now
23 where we are moving towards greater access in our court
24 proceedings, but that we are moving towards greater access in
25 our court proceedings does not mean all or nothing.

1 It is in fact every interaction that you have where
2 someone is not able to maintain social distancing is a risk.
3 It might be a small risk with mitigation measures, but it is a
4 risk. And the more of those interactions you have the greater
5 the risk that there will be a transmission.

6 So it is entirely sensible to conduct hearings
7 where everybody wants them to be conducted by video conference
8 because if you can -- you have to consider the risk and the
9 need.

10 And so there's almost no zero risk situation except
11 when we're doing a video hearing, right? So that's a zero
12 risk situation. If there isn't a need to go into a more risky
13 situation, you don't do it, but it's not the same with people
14 who are incarcerated because someone has determined that they
15 pose a risk to the community.

16 There is a risk and a need, and we are doing
17 everything we can to mitigate the risk and balance the risk
18 against the need, and that's how I'm viewing it. I hope you
19 assume I'm not so cavalier. I recognize that there are risks
20 to everybody that I incarcerate. I wish I could work in an
21 environment -- you don't have to make these decisions. I do.
22 And I have to care about you, and I have to care about Mr.
23 Cantwell, and I have to care about everybody in those prisons,
24 and I do. All right?

25 So let's just keep this in the right context here.

1 MR. WOLPIN: The reason -- that is not the basis
2 for the motion. It's one factor to consider. I agree with
3 the Court.

4 There is a risk. It needs to be in there. It
5 needs to be considered in deciding whether the risk and the
6 action here is necessary.

7 So is continued confinement of Mr. Cantwell
8 necessary when there is this risk that's more than zero, as
9 you noted, and is higher presumably as we tend to understand
10 in communal facilities than if he were living in his solo
11 apartment by himself.

12 So I'm not suggesting that this is the be all end
13 all or the Court is being cavalier or not considering it, but
14 I do think it's part of the picture of do we have to
15 incarcerate when --

16 THE COURT: One of the things that may help you is
17 I can tell you I have reviewed now every single defendant who
18 was on the trial list for July. Right now you are number one,
19 okay? You are my number one case. So as soon as I get to do
20 a jury trial, right now you're up, okay? So it's not
21 likely -- it's likely that we will reach your case if you want
22 it to be reached sooner rather than later, but if we are not,
23 this is a dynamic situation. If there were to be a drastic
24 increase in significant infections in that jail, I would have
25 to reassess my assessment. I'm not sure how it would come

1 out, but I'm not precluding you from presenting me with new
2 relevant information that bears on this issue because I'm
3 concerned about the people under my control every single day.
4 I control you. I control the prosecutor. I control these
5 defendants. It's a real responsibility, I don't take it
6 lightly, and it may change over time. I want you to
7 understand that. I consider risk, but I have to evaluate it
8 in a particular way. I have to evaluate it scientifically,
9 not emotionally, and I have to balance it against need.
10 That's how I have to assess that aspect of it.

11 So I don't think we really disagree here. I'm sure
12 you're not assuming that I have this kind of ignorance or
13 indifference. I care about it. I really do.

14 Did you want to say anything else on this
15 particular issue?

16 MR. WOLPIN: No.

17 THE COURT: All right.

18 Ms. Krasinski, did you want to address this
19 particular issue?

20 MS. KRASINSKI: In the context of the Bail Reform
21 Act, no, your Honor.

22 THE COURT: I do want to briefly address, Mr.
23 Wolpin, the other related concern that you touched on, and
24 that is your client's ability to ensure that he's able to
25 prepare his defense. That's very important to me.

1 I understand your office will not allow you to have
2 in-person visits yet although in-person visits are being
3 conducted at the facility by other lawyers. That's a decision
4 your bosses have to make, and I respect that because they're
5 concerned about you just like I am. But I am really pleased
6 that the Chief Judge has taken the lead in ensuring that you
7 can have private Zoom conversations with your client. I will
8 do everything necessary to facilitate that.

9 As the trial date approaches, if I don't grant your
10 bail motion, I will give you daily, nightly access by Zoom if
11 I need to to ensure your case is ready for trial.

12 As I said, you're number one on my list because
13 everybody else had legitimate reasons why they wanted
14 continuances and you did not assert a need for a continuance,
15 and everybody else on my list had other reasons why they want
16 continuances unrelated to COVID. So that leaves you as the
17 number one even though your case isn't the oldest, and we'll
18 move forward with it as soon as we possibly can. And if I
19 don't grant the bail motion, I will make sure personally that
20 you have Zoom contact with your client as necessary to ensure
21 that he can prepare his defense. It's very important. I'm
22 really glad the jail has accommodated us on that, I'm grateful
23 to the superintendent, and I'll make sure you have that
24 contact.

25 All right. What else would either of you -- Mr.

1 Wolpin, I should give you this chance. I tend to -- the way I
2 tend to analyze problems, you can argue that it is reductive,
3 that what you do is you look at each thing in a silo and you
4 don't look at things holistically, and I'm sure you want to
5 present a holistic argument that, Judge, consider all of this
6 together. He's not a danger. You can construct conditions
7 like home detention with electronic monitoring that he'll
8 comply with. Any kind of holistic argument you want to make
9 along those lines I'll hear it.

10 MR. WOLPIN: Okay. Thank you.

11 Yes, we're in a position -- I spoke with his
12 landlord yesterday. He has a home in Keene that he has lived
13 at for a significant period of time continuously. Although,
14 you know, his landlord is not someone who may agree with his
15 political beliefs sees him as a positive tenant, someone who
16 doesn't cause issues in the neighborhood or in his home. And
17 so we have a place that's a solid, known, certain place for
18 both social distancing purposes as well as supervision
19 purposes that he is going to go to and be at.

20 As far as concerns the government has expressed
21 about firearms, we have signed over those firearms to his
22 landlord to be sold to satisfy prior back rent. Those are no
23 longer in my client's purview or access. They're not under
24 his name. They've been provided to a gun shop for sale. So
25 at this point there is not a firearm available to my client.

1 Obviously there are Second Amendment rights that
2 came with it. The government has not alleged that he was a
3 person who is prohibited from firearms. We live in New
4 Hampshire where firearms are a pretty commonly possessed item
5 for many reasons, but at this point that's gone. They're not
6 his. They're not accessible. They're gone. So we have
7 someone who is a steady residence, who has no firearms, and
8 has those out of his possession.

9 We have someone who has, as we talked about, said I
10 will abide by this discovery order and who the Court can set a
11 monitoring condition. We have electronic monitoring
12 capabilities. We have home confinement capabilities. We have
13 the letter that was submitted in relation to the earlier
14 hearing from that prior monitor that is very positive that
15 indicates, you know, constant contact and communication.

16 He's not someone who fell off the map or wasn't
17 involved and who is compliant with those conditions.

18 So we have housing, no firearms, and we have the
19 ability for electronic monitoring with some track record. As
20 much as the government is going to point to the track record
21 of the online naming situation, we also have a track record
22 with the bracelet situation and that is far more positive.

23 Looking at what was sent around -- and again, I
24 apologize, I can't access my stuff for some reason. It did
25 look like it had a 22-mile radius. So it was beyond simply

1 just staying within the state but staying within a smaller
2 window which again shows an ability to abide by conditions.

3 No contact provisions. We have -- this is not a
4 situation where we have two local individuals. The other
5 person, without again getting into details about where they
6 are, is a thousand plus miles away, has eliminated his online
7 presence, and so the sort of likelihood of interactions
8 occurring at this time is incredibly slim. There is no
9 pattern of that. There's no evidence or suggestion that Chris
10 ever went out to that place or visited him or called him or
11 e-mailed him in the last, you know, ten plus months.

12 So as far as a concern for that individual, there
13 is no such concern in our mind. So the Court can set the no
14 contact provision as well.

15 Obviously alcohol and drug, you know, requirements,
16 the Court can set them too with monitoring, with requirements
17 that he participate and do that. We have some background.
18 Also looking at the -- and I'll use the word SCRAM, which is
19 the alcohol component, is something that he complied with. So
20 the Court can have some assurance as far as drug and alcohol
21 provision and conditions compliance.

22 As far as his contact with the police, I know
23 there's some dispute about whether he was wholly honest or
24 not, I'll leave that for another day, but it is clear from
25 what both sides have presented that he is someone who has

1 contact with his local police department, a relatively
2 positive one, who has gone to them in the past, who's met with
3 them, who's met with the FBI, who's not someone who is so
4 antagonistic to law enforcement or supervision that he's going
5 to, you know, refuse to participate with them. That's not his
6 mindset. We see that throughout discovery that that's not his
7 mindset.

8 So I certainly see in this case conditions the
9 Court can set on a charge like this where we ultimately have
10 someone with a misdemeanor record. It is for the involvement
11 of pepper spraying of others. He was pepper sprayed himself
12 in that instance as well. It was a group, I'm sure the Court
13 has some familiarity from the filings about the findings of
14 the Independent Reviewer of Charlottesville, but in that
15 instance was talking about the need for police to be involved
16 in the safety of others.

17 So this is not someone with a lengthy criminal
18 history of violent acts against others, you know, first degree
19 assaults, second degree assaults, you know, those kinds of
20 things. Those are simply not in his criminal record or
21 criminal history.

22 I think -- and I know the Court is well aware of
23 sort of presumptions in Salerno in the sense of what bail is
24 intended to do. It's certainly a sense that bail is just not
25 some kind of global preventative detention issue but should be

1 really tied to the need for this offense to protect the
2 individuals involved as I see it. Salerno says that
3 incarceration pretrial should not be the norm but the
4 exception. This is, again, an offense that's not likely
5 guidelines-wise in sort of the upper echelon of potential
6 offenses and certainly something I think the Court can set a
7 whole series of conditions that are very restrictive and
8 agreeable to our client that will assure that the community is
9 protected as well as the safety and appearance of Mr.
10 Cantwell.

11 THE COURT: All right. Thank you.

12 What does the government want to say?

13 MS. KRASINSKI: I'm not going to rehash all of the
14 evidence that was presented before the Magistrate Judge. I'll
15 just simply say that none of the conditions that Attorney
16 Wolpin presents to the Court mitigate the serious risk of
17 danger that the defendant poses to not just the victim but to
18 the community at large, and so the government respectfully
19 requests that he remain detained pending trial.

20 THE COURT: All right. Anything else before we
21 wrap up the hearing?

22 I'll take it under advisement. I'll issue a
23 written decision. I will of course apply the correct standard
24 of de novo review. I'll look at the entire record.

25 These are important decisions. They're very

1 time-consuming decisions for a district judge, and up till now
2 and up until recent days they've been extremely rare that
3 people are pursuing these kinds of appeals.

4 Unfortunately, I'm backed up because people have
5 been taking these kind of appeals, and I'm not just going to
6 lightly disregard the de novo review standard. So it may take
7 me a while to work through it, but I will.

8 And in the meantime I would advise counsel for both
9 sides to start getting ready for trial because I can't promise
10 you when we will have a trial date, but I can tell you that we
11 are moving in that direction and a lot will depend upon the
12 prevalence of active SARS in our community and the
13 effectiveness of mitigation measures that we've identified.

14 We're engaged in active planning for restructuring
15 a courtroom to bring a jury back in and to start trying. The
16 judges on this court want to be able to try cases as soon as
17 we possibly can consistent with the public health needs, and
18 we are moving in that direction.

19 So I can't predict what will happen with the
20 prevalence of the disease in our community, but if it remains
21 at the levels that it's at now, you should expect to be ready
22 for trial within a matter of a couple of months. So get
23 ready. I'm going to be calling you first.

24 If for some reason you're not ready or need
25 additional time for reasons unrelated to the pandemic, you

1 should let us know as other defendants have and I will
2 carefully consider requests for extension, but if that's
3 something you would be seeking, I would rather hear about it
4 less than two weeks before the trial because I'm telling you
5 now you won't have to try during July. I can't rule out
6 trying in August. I think it's at least a possibility. I
7 think it's a higher possibility that you should be ready for
8 trial in September. And if you don't want a September trial
9 date for reasons that are legitimate and unrelated to the
10 pandemic, you need to let me know. And if you do, I will
11 consider it. And if you don't, I will proceed under the
12 assumption that you will be the first case that I will try
13 when I get back to trial, okay?

14 Anything else anybody wants to say?

15 MS. KRASINSKI: No, your Honor. Thank you.

16 THE COURT: Okay. Thank you. I appreciate it. It
17 was helpful argument, and the hearing is concluded.

18 MR. WOLPIN: Thank you.

19 (Conclusion of hearing at 11:49 a.m.)
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C E R T I F I C A T E

I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Submitted: 5-4-21

/s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR